REMARKS/ARGUMENTS

Initially, the Applicant would like to thank the Examiner for the courtesy of the interview on March 13, 2007. As summarized in the Interview Summary, the Applicant disagrees with the finality of the February 22, 2007 Office Action and requested that the Examiner reconsider her position. Additionally, the Applicant discussed limitations made in the preliminary amendment of January 23, 2007, which accompanied a Request for Continued Examination. The Examiner maintained the position of record, while appearing to indicate a potential favorable reconsideration regarding the limitations set forth in claim 2.

In the Office Action of February 22, 2007, the Examiner issued a final rejection of claims 1-39 and 81. More specifically, claims 1-39 and 81 currently stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Zietlow et al. (U.S. Patent No. 6,207,216) in view of Igoe (Dictionary of Food Ingredients, 4th Edition). By this amendment, claims 1 and 8 have been amended. More specifically, claim 1 has been amended to recite about 5-25% (dry weight basis) of a softening agent. This limitation comes from prior claim 2 which has been canceled. Claim 8, which previously depended from claim 2, has been amended to depend from claim 1.

The present invention is directed to a **soft dried** marshmallow. The Applicant has emphasized that the present invention has physical and chemical properties that differ from the cited prior art. Importantly, the present invention provides for a marshmallow that is dried and shelf stable, but is also soft in texture, even when immersed in a cold fluid. The novel physical aspects of the present invention are quantified using glass transition temperature (Tg) and springback factor limitations. As is known in the art, aerated confections are relatively soft and pliable above their specific Tg, and typically have a firm or hard texture below their Tg. In support of these facts, see, for example, U.S. Patent No. 6,387,432, column 3, lines 18-23. The softness of an aerated confection can also be evaluated using a bulk compression test to provide a springback factor, or the

percentage of lost volume recovered after the confection is compressed. See paragraph 0053 of the present application.

As set forth in claim 1, the present invention has a Tg of below 5° C, and a springback factor of a minimum of 20% and up to 50%. None of the prior art, either alone or in combination, either teaches or suggests the dried soft aerated confection as claimed.

The Examiner's § 103 rejection relies on Zietlow et al., which is directed to a dried, **crisp, frangible** marshmallow owned by the assignee of the present invention. Note column 1, lines 35-36 of Zietlow et al., which states that the marshmallows "exhibit desirable crisp, frangible eating qualities." The Examiner also cited Igoe, which teaches that glycerin can be utilized in a marshmallow. However, even if Zietlow et al. can be properly combined with Igoe, the combination does not teach or suggest a marshmallow having the features of the present invention. As understood, the Examiner is adding glycerin to the product of Zietlow et al. based on Igoe which employs glycerin as "a humectant, crystallization modifier and plasticizer." But why is this combination being made, just because glycerin could be added to a marshmallow? It is respectfully submitted that the Examiner has failed to provide proper motivation for the combination of references in the § 103 rejection.

A factor relevant in considering proper motivation to modify prior art is when the prior art teaches away from the claimed invention. A reference may be said to teach away when a person of ordinary skill, upon reading the reference, would be led in a direction divergent from the path that the Applicant took. *In re Gurley*, 27 F.3d 551, 31 USPQ 2d 1130, 1131 (Fed. Cir. 1994). The Applicant respectfully submits that the Zietlow et al. reference clearly teaches away from a **dried soft** marshmallow having a softening agent sufficient to provide a **glass transition temperature of less than 5° C.** For example, the background of Zietlow et al. discusses dried marshmallow bits for use in cereals, stating that:

> "[t]hese dried marshmallow pieces exhibit **desirable crisp, frangible eating qualities**... Generally, dried marshmallow pieces soften but do not dissolve upon exposure to cold milk and rapidly loose their **desirable crisp and frangible eating qualities**. Efforts have thus been made at extending the bowl life of dried marshmallow pieces in cold milk, i.e., **to lessen their propensity to soften** in cold milk." Emphasis added. See column 1, lines 35-36 and column 2, lines 11-16 of Zietlow et al.

The Zietlow et al. reference clearly does not want to create a soft marshmallow and actually addresses "the problem of softening" by formulating dried marshmallows that dissolve quickly in cold water or milk. The Examiner states that Zietlow et al. teaches moisture loss as a problem in marshmallow compositions. See column 1, lines 21-35 of the Zietlow et al. reference. The Applicant fails to see how this statement provides proper motivation for the combination of Zietlow et al. and Igoe. Moisture loss and softness of a marshmallow are two distinct problems. The present invention is directed to a marshmallow having a low moisture content of between 1-10%. Regarding claims 8, 12 and 14, glycerin is not added to retain moisture, but is added as a softening agent. Regardless, while the Zietlow et al. reference does not discuss a specific glass transition temperature, one skilled in the art would recognize that the marshmallow of Zietlow et al. is, at the very least, crispy at room temperature (20° C or 70° F). As aerated confections are relatively soft and pliable above their specific Tg, the Zietlow et al. marshmallow must have a Tg of greater than 20° C. In contrast, the present invention has a Tg of **less than 5° C**.

Additionally, the Examiner points to the broad statement in Zietlow et al. that the marshmallow of Zietlow et al. can comprise 0.01-25% of additional materials for the improvement of the organoleptic and visual properties of the final food product. See column 4, lines 43-49. The Examiner points to the presence of sodium caseinate and corn syrup (which have moisture retention properties) in Zietlow et al. and states that they function as "softeners." However, the marshmallow of Zietlow et al. is clearly a

crisp marshmallow and not soft at all. In fact, nowhere in Zietlow et al. is there a suggestion to add a softening agent, let alone 5-25% of a softening agent to provide a glass transition temperature of less than 5° C and a springback factor of 20-50%. Indeed, one would be hard pressed to argue that the organoleptic or visual properties of the Zietlow et al. confection would be improved by the addition of a softening agent, as the reference teaches the desirability of obtaining crisp, frangible eating qualities. Simply stated, one of ordinary skill in the art would not at all look to add 5-25% of a softening agent to a product desired to be crisp and frangible as the product cannot be both "crisp and frangible" and "soft" at the same time.

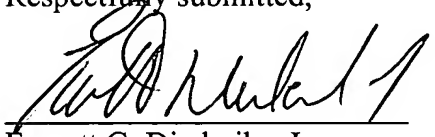
It is true that the prior art teaches utilizing a softening agent in marshmallows. However, the marshmallow in Zietlow et al. has distinctly different properties from a soft marshmallow. There is simply no motivation provided by the prior art to add a softening agent to the **dried quick dissolving** marshmallow of Zietlow et al., let alone the now claimed percentage of 5-25% of the softening agent. In fact, adding such an agent would actually destroy Zietlow et al. Zietlow et al. discloses a crisp marshmallow that simply would not have a springback factor of 20-50% as required in the claims. Many different food additives and ingredients are available, however, that does not mean that there is motivation to combine any or every one of them with the marshmallow of Zietlow et al. As stated by the Federal Circuit: "[o]bviousness cannot be established by combining the teachings of the prior art to product the claimed invention, absent some teaching suggestion or incentive supporting the combination." *In re Geiger*, 815 F.2d 686, 2 USPQ2d 1276, 1278 (Fed. Cir. 1987). Basically, it is respectfully submitted that:

1) a proper motivation for the combination has not been established; and

2) even if one were to add glycerin, for any purpose, to the marshmallow of Zietlow et al., the glycerin would never be added in the range of 5-25% to establish a glass transition temperature of less than 5° C and a springback factor of a minimum of 20% and up to 50% as claimed given the desire for a crisp and frangible product in Zietlow et al.

Based on the above, it is requested that the prior art rejections be withdrawn, the claims allowed and the application passed to issue. If the Examiner should have any additional concerns regarding the allowance of the application that can be readily addressed, she is cordially invited to contact the undersigned at the number provided below in order to further expedite the prosecution.

Respectfully submitted,



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